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Non-Profit Law and Consulting in Conservation of Natural Resources and the Global Environment

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**Memo to: Dana Cooper, Patti Beneke, and Tom Hagler****From: John Cain****Re: Revised Phase II Document – Transfers Section****Comments on Dec. 9 Draft Transfers Section.**

Below, please find NHI's suggestions for the water transfers section of the draft preferred alternative. As you will see we have substantially reorganized the Dec. 9 draft from a hodge podge list to 8 related categories of actions. The most important change is the creation of an independent expert panel of economists, hydrologists, and lawyers. All other processes described in the Dec. 9 draft should grow out of the recommendations of this expert panel. The second most significant change is the provision of incentives for water districts to facilitate transfers rather than impede them.

All additions are in bold and deletions are struck. Text held over from the Dec. 9 draft is in a regular font even if it was bolded in the Dec. 9 draft. Text from the Dec. 9 draft not included here was not considered necessary or objectionable and was omitted for time reasons only.

If you have any questions, comments, or suggestions, please contact John Cain or Greg Thomas. We would like to be involved in polishing this section.

**Starting on first full paragraph of pg. 73**

Based on the recommendations of the BDAC Water Transfer Work Group, the Transfer Agency Group, and other Stakeholders, CALFED will implement the following actions.

~~A process for CALFED agencies to work with stakeholder representatives to clarify and define what water is deemed transferrable under what conditions. The objective of this~~

~~process will be to develop a standardized set of rules on transferable water. . . . The details of stakeholder representatives, have not been determined. Strike this entire paragraph that was included on bottom of page 74 of Dec. 9 draft.. It is a recipe for more of the same. Stakeholders have neither the expertise, discipline, nor objectivity to address this issue. Rather, following the model of the ERP strategic plan, we need to establish a high caliber technical panel and process that the stakeholders have confidence in to address these issues. See the next paragraph on developing a strategic plan and expert panel.~~

Although, much of the text is the same as the Dec. 9 draft, it has been reorganized into 8 categories of actions that will be guided by a strategic planning process modeled after the ERP strategic planning process. An essential element of this process is the establishment of an independent, objective, expert panel.

1. **Develop a Strategic Plan.** Convene, by March 1, 1999, legal, economic, hydrologic, and other relevant experts that do not represent stakeholders which have a potential pecuniary interests in water markets to develop a strategic plan for developing a robust water transfers market. These experts should be selected with input of stakeholders and charged with the task developing a strategic plan to utilize a water transfers market as a tool to increase CALFED goals consistent with the CALFED solution principles, bearing in mind that water transfers, water conservation and conjunctive water management are aspects of an integrated water management strategy. Following the model of the ERP strategic plan, stakeholders will be provided a forum to voice their objectives and concerns.

*This is particularly important in the transfers context since significant sums of money are at stake. If necessary or desirable, selection of this expert panel could probably be achieved by consensus as was the case in the ERP process.*

The strategic plan should be developed by two separate, but sequential panels. The first panel should be composed of hydrologists, economists, ecologists, and water managers charged with the task of identifying physical and economic strategies for optimizing beneficial uses of water for both economic and ecological purposes irregardless of current law.

- A set of measurable objectives for the water transfers program to achieve the ecological and water supply goals of the CALFED program.
- Develop a set of physical, and economic indicators of a robust transfers market.
- Recommend methods and strategies for measuring the quantity of transferable water and tracking its movement toward an intended beneficial use.

- Evaluate of the physical barriers to market transfers and recommend strategies for surmounting those barriers.
- Evaluate and recommend strategies to utilize conveyance and storage markets or other innovations for developing affordable and environmentally benign solutions to conveyance and storage constraints to a robust storage markets.
- Describe the magnitude and distribution of third party impacts and identify a method for quantifying third party economic impacts.
- Recommend actions for mitigating and compensating third party impacts.

The second panel will be composed of independent legal experts who will be charged with developing recommendations for conforming the law to implement the hydrologic conditions and economic incentives recommended by the first panel. Among other things, this panel will:

- Evaluate the types of transfers allowed by existing law and develop a comprehensive list and rank order the legal and institutional barriers to water transfers.
  - Identify the legal and institutional reforms necessary to achieve ecologic and hydrologic objectives.
  - Identify legal reforms for developing an appropriately regulated but robust water market and efficiently mitigating third party impacts of market transactions.
2. Based on the guidance of the strategic plan Establish a water policy clearinghouse to ensure . . . *(insert entire section as drafted in Dec 9 draft)*
  3. Develop a program of incentives to encourage water districts to act as facilitators and mediators of water transfers rather than as obstacles to water markets.

CALFED will develop incentives to encourage districts to establish water buyback programs in which the districts would offer to purchase water back from its members at prices, in amounts, and at times that respond to offers to buy received from outside of the district. Any member's decision to release water back to its district would be wholly voluntary. Ideally, the offers to buy and sell would be posted on a state-wide electronic bulletin board which might be referred to as the California Water Exchange (CWE). To assure that in-district needs would be met before water left the district, the buyback programs should include a right of first refusal exercisable by any district member at the bid price<sup>1</sup>. The remaining buyback water would be available to satisfy purchase offers from outside of the district (i.e. from the CWE).

<sup>1</sup> However, there is an issue whether the right of first refusal should not apply to environmental water transfers which confer a broad public benefit that should not be subject to pre-emption by water users interested in purchasing the same water.

**4. Streamline the approval process for low impact or fully mitigated water transfers**

- Coordination among CALFED agencies to formulate policy . . . (continue with Dec. 9 draft)
- Development by CALFED agencies of a standardize checklist and analysis procedure to be followed by . . . (continue with Dec. 9 draft)
- Consistent with the recommendations of the transfers strategic plan, the water code will be amended to command the State Board to exercise its rulemaking authority to develop a fast-track approval process, under criteria codified by the statute. The State Board would determine which categories of transfers are sufficiently innocuous from the standpoint of protected legal interests (including the environment) to be eligible for expedited approvals, including categorical exemptions from CEQA. The statutory criteria should confine expedited transfers to environmental water transfers under section 1707 of the Water Code and transfers that confer a net benefit on the aquatic environment.

The Board rules would also prescribe the "fast-track" approval process for those eligible categories of transfers. The Board will determine what type of hearing, if any, to conduct for these transfers, what kind of environmental documentation will be required, what the protest opportunities will be, and how to allocate burdens of proof.

- 5. Based on the recommendations of the water transfers strategic plan, CALFED will work for changes in state and federal law to facilitate transfers.**
- 6. Based on the recommendation of the water transfers strategic plan, CALFED will work for institutional and legal changes to facilitate the conveyance and storage of transferred water and address related issues.**
- Develop a process for CALFED agencies to work with stakeholder representatives to develop cost criteria associated with transporting transferred water through state or federal conveyance facilities . . . Clarifying carriage water criteria may be resolved with a longer term process that relates closely to operational changes being proposed for Delta water management since they can impact the necessity for carriage water. *(insert this paragraph from Dec. 9 draft)*

- **Forecast and disclosure by DWR and USBR of potential conveyance capacity to provide transfer proponents more timely information . . . Delta water quality standards, and physical capacity limitations. *(insert this paragraph from Dec. 9 draft)***
  - **Develop a process for CALFED agencies to work with stakeholder representatives to develop cost criteria associated with transporting transferred water through state or federal conveyance facilities. . . . *(insert this paragraph from Dec. 9 draft)***
  - **Develop a process for CALFED agencies to work with stakeholders representative to develop potential procedures for transporting transferred water through existing water conveyance facilities. The purpose is to . . . *(insert this paragraph from Dec. 9 draft)***
  - **Facilitate the development of conveyance and storage markets or other innovations that efficiently address potential storage and conveyance constraints on a water transfer market.**
- 7. Based on the recommendations of the strategic plan, develop a process for CALFED agencies, in consultation with stakeholders, to identify and develop interim rules, regulations or procedures necessary for an effective water transfer market pending long term resolution of definitional and procedural issues identified above by strategic plan.**
- 8. Based on the recommendations of the strategic plan, develop a process for CALFED agencies to work with stakeholder, the Legislature, and local agencies to identify appropriate assistance to enable local agencies to develop and implement groundwater management programs to protect groundwater basins in water transfer source areas.**

***Strike last paragraph regarding implementation of these recommendations.***